

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PHILIP NEUMAN,

Plaintiff, Cross-complainant and
Respondent,

v.

RICHARD BAKER,

Defendant and Respondent;

POTOMAC GROUP WEST,

Intervener, Cross-defendant and
Appellant;

STEVEN LEISHER,

Cross-defendant and Appellant;

DOUGLAS P. WILSON, as Receiver, etc.,

Respondent.

D052102/D052796

(Super. Ct. No. GIN046335)

CONSOLIDATED APPEALS from orders of the Superior Court of San Diego
County, Jacqueline M. Stern, Judge. Stayed in part and affirmed in part, as modified.

This action arises out of a dispute between business partners Philip Neuman and Richard Baker involving their company Sandstone Financial, LLC (Sandstone). Neuman filed a complaint against Baker, accusing him of raiding Sandstone's assets for his personal use. Potomac Group West (Potomac) filed a complaint in intervention alleging it was owed commissions by Sandstone for brokerage work it performed on Sandstone's behalf. Neuman filed a cross-complaint against Potomac and its principal, Steven Leisher, alleging they were improperly withholding funds owing to Sandstone.

At the request of Baker, the court issued an order to show cause (OSC) why a receiver should not be appointed to manage the affairs of Sandstone. Neuman filed a statement of nonopposition, and Potomac and Leisher stipulated to the receiver's appointment. The court appointed Douglas P. Wilson as Sandstone's receiver.

After Wilson was discharged and issued his accounting, he sought to have his fees and those of his counsel, which totaled close to \$100,000, paid by the parties. Potomac and Leisher objected to having to pay a share of Wilson's fees. The court awarded Wilson a total of approximately \$96,000 for his fees and those of his counsel, to be divided equally among the parties.

Potomac and Leisher appeal the court's orders¹ approving Wilson's fees and allocating them among the parties, asserting the court abused its discretion in apportioning part of Wilson's fees to them because (1) they did not request appointment of a receiver, (2) they received no benefit from the receivership, (3) Potomac and Leisher

¹ This court ordered the consolidation of the appeals pending in this matter (D052102 & D052796) on July 8, 2008.

together should only bear one-third of the fees, and (4) there was no basis to impose liability for Wilson's fees personally against Leisher.

While this matter was pending, and after oral argument was scheduled, we were informed by Wilson that Potomac has been in bankruptcy for almost one year, and that Potomac, Leisher and their counsel, Ronald H. Blumberg, failed to notify this court of that fact. We requested supplemental briefing, including from the bankruptcy trustee, on the impact of Potomac's bankruptcy on this appeal. We also issued an order to show cause (OSC) why Leisher and attorney Blumberg should not be sanctioned for continuing to pursue this appeal without notifying this court and Wilson of Potomac's bankruptcy.

We first conclude that portion of the appeal concerning Potomac and Leisher's contention Leisher cannot be held personally liable for Wilson's fees is stayed by virtue of Potomac's bankruptcy proceedings. We further conclude that (1) the court acted within its discretion in imposing fees against Potomac and Leisher, (2) the court properly divided the fees equally among the four parties, and (3) pursuant to Wilson's request in supplemental briefing, we shall modify the orders to make Leisher jointly and severally liable for the total amount of fees awarded against Potomac and Leisher. Furthermore, we order sanctions of \$900 against Leisher and \$900 against his counsel, Blumberg, for their continued prosecution of this appeal without notifying this court and Wilson of Potomac's bankruptcy.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Litigation

Neuman initiated the litigation by filing a complaint for injunctive relief. He alleged that he and Baker were the sole owners of Sandstone, a Nevada company that financed life insurance premiums. Neuman alleged that Baker was diverting company funds into an account at Bank of America under his control and was withdrawing the funds for his personal use and benefit. He later amended the complaint, adding additional parties and causes of action.

Baker filed a cross-complaint against Neuman, alleging that he had made unauthorized transfers of money. Neuman thereafter filed a cross-complaint against Potomac, alleging it was attempting to act as a broker for Sandstone in violation of Nevada law, and sought to enjoin Potomac from doing so. However, Newman then dismissed the cross-complaint.

Shortly thereafter, Potomac brought an ex parte application for leave to file a complaint in intervention. In the application, Potomac alleged that it had "contractual relations with Sandstone" and was "currently owed commissions" from Sandstone. The court granted Potomac's application, and it filed its complaint in intervention, seeking declaratory relief to determine its liability for insurance policies issued by Sandstone and to determine its right to commissions due it from Sandstone.

In response, Neuman filed a cross-complaint against Potomac and Leisher, alleging they were acting improperly by attempting to broker the sale of life insurance policies, and that they were improperly withholding funds due Sandstone. Neuman then

filed an ex parte application for a temporary restraining order against Leisher and Potomac, seeking to prevent them from taking further actions related to one of Sandstone's insurance policies. Leisher and Potomac opposed the application, arguing that the insurance policy that was the subject of the application had been assigned to Potomac, it was to be sold in the secondary market, and a portion of the proceeds of the sale would go to Potomac as a commission. In Leisher's declaration he stated that if the court granted the temporary restraining order, Potomac's liability might exceed \$10 million. The court granted Neuman's application, noting that because the parties were asking the court "to micro-manage the day-to-day business of Sandstone," if the parties could not "agree how the business debts should be paid or how the business is to be run pending the final disposition of this lawsuit, the [c]ourt will consider setting an order to show cause for the appointment of a receiver for that purpose."

B. Appointment of Receiver

In July 2006 Baker filed a petition to appoint a receiver in litigation pending between the parties in Nevada. Counsel for Leisher and Potomac appeared at the hearing on Baker's petition. The Nevada court refused to appoint a receiver at that time, deferring to the California court in this case.

In this action, the court issued an OSC for appointment of a receiver. Baker made the initial application for appointment, and Neuman filed a statement of nonopposition. Leisher and Potomac were served with notice of the hearing date on the appointment of the receiver and with Neuman's statement of nonopposition. Although the record does not disclose Leisher and Potomac's position on appointment of the receiver at the time of

the hearing, counsel for Potomac and Leisher appeared at the hearing and did not oppose appointment of a receiver. However, as will be discussed in more detail, *post*, at a later hearing date, in response to a question from the court, counsel for Potomac and Leisher conceded that they had stipulated to appointment of a receiver. Further, after the court appointed Wilson as receiver, all parties, including Potomac, stipulated to an order authorizing Wilson to employ counsel to assist him in performing his receivership duties.

C. Discharge of Receiver/Final Accounting

In January 2007, the parties, including Potomac, stipulated to a discharge of the receiver Wilson. In the stipulation, the court retained jurisdiction to determine the receiver's compensation. In April the receiver filed his final accounting and report. In the report, Wilson described the dispute in this matter as involving the amount of commissions and distributions to which each party, including Potomac, was entitled. He described the problems he had in performing his duties due to the lack of cooperation of the parties, in particular Potomac and Leisher. When the receiver attempted to prevent some of the policies from lapsing, Leisher and Potomac "demanded 'exclusive, unfettered rights' to handle the sale of the policies and expressed 'concern with reporting and depositing funds'; demands which run contrary to the operations of a receivership." Moreover, "[r]epeated requests to [Potomac and Leisher] to turn over documents relating to these policies were unsuccessful."

The beginning balance of the receivership's bank account was \$0, and the balance at the end of the period was \$5,174. The receiver's fees totaled \$41,047.74, and his counsel's fees totaled \$50,168.08. Wilson requested that the balance in the receivership

account be applied to his fees and the remaining amount of his and his counsel's fees be paid by the parties.

D. Potomac and Leisher Object To Bearing Any Responsibility for Receiver's Fees

For the first time after Wilson filed his final accounting and report, Potomac and Leisher objected to being held responsible for paying any of the receivership's expenses. Potomac and Leisher argued they "did not want the Receiver appointed and received no benefit, whatsoever, from the actions of the Receiver." Neuman, by contrast, argued that most of the receivership fees should be borne by Potomac and Leisher due to their interference with the receiver's duties.

E. Court's Order

At the hearing on the application for Wilson's receivership fees, Potomac and Leisher argued they should not be responsible for a share of the fees. However, on two occasions during the hearing, Potomac and Leisher conceded they stipulated to appointment of the receiver. For example, the following exchange occurred between the court and counsel for Potomac and Leisher:

"The Court: And there's no dispute that you stipulated to the appointment of the receiver, is there?

"Mr. Blumberg: There's no dispute about that . . . Your Honor. We obviously did that for various reasons. . . . [W]e're not denying that we stipulated to it, but that doesn't mean that we were asking for the receiver to be there. It simply means we weren't going to oppose it and fight it."

The court took the matter under submission and awarded Wilson \$46,221.74 for his fees and \$50,168.08 for the fees of counsel, to be paid out first from the receivership

estate, with the shortfall to be divided among "Neuman, Baker, Leisher, and [Potomac]."

In doing so, the court found that "Baker requested the receiver be appointed, which request was not opposed by Neuman, and was stipulated to by Leisher and [Potomac]."

Thereafter, the court awarded supplemental fees incurred by Wilson's counsel, again to be "split equally amongst all parties."

DISCUSSION

I. *POTOMAC'S BANKRUPTCY*

Following the parties' briefing in this matter, and after this matter was set for oral argument, we were informed by Wilson that he had received notice that Potomac has been the subject of bankruptcy proceedings since August 22, 2008. At oral argument, the bankruptcy trustee appeared and requested that she be allowed to address the impact of the bankruptcy on this appeal. We set a briefing schedule requesting the parties to file supplemental briefs addressing this issue. The trustee and Wilson responded with letter briefs. Potomac and Leisher did not respond.

Based upon our analysis of this issue, and input from the bankruptcy trustee and Wilson, we conclude that the appeal must be stayed as to that portion of the appeal seeking to absolve Leisher of personal responsibility for Wilson's fees because, as an effort to shift liability solely to Potomac, it is in effect a prohibited continuation of an action against the debtor that may be detrimental to the bankruptcy estate. (11 U.S.C. § 362(a)(1); *Parker v. Bain* (9th Cir. 1995) 68 F.3d 1131, 1135-1138; *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 333.)

We also conclude that portion of Potomac's and Leisher's appeal seeking to reverse the award of fees in its entirety and to reduce the percentage of fees allocated against them is not stayed as "[i]t is a claim by, not against, the debtor, and its successful prosecution would 'inure to the benefit of the bankruptcy estate.' [Citation.]" (*Parker v. Bain, supra*, 68 F.3d at p. 1138, fn. omitted.) Further, because imposition of joint and several liability against Leisher will not negatively impact the bankruptcy estate, we may address that issue as well. Finally, despite the stay, we have the power to impose sanctions against Leisher and attorney Blumberg for abusing the appellate process and violating rules of court. (*Keitel v. Heubel, supra*, 103 Cal.App.4th at pp. 333-336.)

II. IMPOSITION OF RECEIVER'S EXPENSES AGAINST POTOMAC AND LEISHER

A. Standard of Review

Courts are vested with broad discretion to determine the manner in which a receiver is compensated. (*Baldwin v. Baldwin* (1947) 82 Cal.App.2d 851, 856.) "The court may assess the costs of a receivership against the fund or property in receivership or against the applicant for the receivership, or it may apportion them among the parties, depending upon circumstances." (*Ibid.*)

B. Analysis

"As a general proposition the costs of a receivership are primarily a charge upon the property in the receiver's possession and are to be paid out of said property." (*Andrade v. Andrade* (1932) 216 Cal. 108, 110.) However, when the property in the receiver's possession is insufficient to reimburse him for his expenses and pay his compensation, the receiver may look to the party at whose instance he was appointed or

to those for whose benefit the receivership was created. (*Stanton v. Pratt* (1941) 18 Cal.2d 599, 603; *Andrade v. Andrade, supra*, 216 Cal. at p. 110; *Baldwin v. Baldwin, supra*, 82 Cal.App.2d at p. 856 ; *Lewis v. Hall* (1918) 38 Cal.App 329, 336.)

As the California Supreme Court stated in *Stanton v. Pratt, supra*, 18 Cal.2d at page 603, "the Receiver looks primarily to the fund of which he was made the custodian for reimbursement of his expenses and for payment of his compensation.

[However,] . . . , if the fund be insufficient, he may then look to the parties at whose instance he was appointed. It may also transpire that liability to pay the expenses and fees of a receivership rests upon any or all of the parties for whose benefit the receivership was created."

"The general rule is that receiver's expenses, in the absence of statute, should in all cases, as between the parties, be adjudged upon equitable principles, and that they are sometimes taxed as costs to be allowed out of the funds, and sometimes taxed against the unsuccessful party, whose conduct created the necessity for a receiver." (*Tevander v. Ruysdael* (7th Cir. 1924) 299 F. 746, 750-751.) " 'This may result from the irregularity of the appointment, or from the insufficiency of the fund, or out of the agreement between the parties.' " (*Ephraim v. Pacific Bank* (1900) 129 Cal. 589, 592.)

Leisher and Potomac first assert the court abused its discretion in apportioning a portion of the funds to them because "[t]he record contains no documents whatsoever of Potomac joining in the receiver bandwagon." However, as detailed above, the record reflects that at the hearing to determine Wilson's compensation, counsel for Potomac and Leisher conceded twice that they had stipulated to appointment of a receiver. The record

further reflects that although given notice of the application to appoint the receiver, they filed no written opposition and, at the hearing at which the receiver was appointed, never voiced any opposition to the receiver's appointment. This evidence demonstrates the court correctly found Potomac and Leisher stipulated to Wilson's appointment.

Potomac and Leisher next argue that they received no benefit from the receivership. However, we need not determine whether Potomac or Leisher benefitted from the receivership as we have already concluded the apportionment of fees was supported by their stipulation to Wilson's appointment. Moreover, the court properly exercised its discretion in apportioning the fees based upon the fact their actions, in part, made the receivership necessary. Potomac filed a complaint in intervention seeking the court's determination of its rights to commissions from policies it allegedly brokered for Sandstone. Leisher was subject to a cross-complaint that sought personal liability against him. The receivership was necessary to a determination of the parties' right to monies and assets relating to Sandstone's transactions. Moreover, according to Wilson, a large portion of his fees were caused by Potomac and Leisher's interference with his performance of his duties. The court had discretion to award the fees on this equitable basis alone.

III. PERCENTAGE OF FEES ALLOCATED TO POTOMAC AND LESISHER

We requested supplemental briefing on the issue of whether it was equitable for the court to impose one-fourth of the receivership expenses each against Leisher and Potomac, as opposed to one-third of the expenses together, given Leisher's status as a principal of Potomac. Leisher and Potomac have ignored this question, asserting only (as

they did in their original briefing) that Leisher cannot be held personally liable for any percentage of the expenses. Wilson in turn asserts it was proper to assess one-fourth of the expenses each against Leisher and Potomac given Leisher's personal involvement in the litigation and obstruction of the receiver's duties. Moreover, Wilson requests that we modify the orders to make Leisher jointly and severally liable for the total amount of expenses imposed against Leisher and Potomac.

We conclude (1) the court acted within its discretion to impose one-fourth of the receivership expenses against Leisher, and (2) we shall modify the orders to make Leisher jointly and severally liable for the total amount of the award of expenses against Leisher and Potomac.

A review of the record in this matter reveals that the cross-complaint against Leisher sought personal liability against him. Moreover, throughout the litigation Leisher was personally made subject to the court's orders, including temporary restraining orders imposed against Leisher in his personal capacity. Further, upon appointment of the receiver, Leisher dealt personally with the receiver and was personally responsible for the obstruction of the receiver's duties. Under these circumstances, the court acted well within its discretion in imposing one-fourth of the receivership expenses against Leisher and Potomac.

Further, based upon the receiver's request in supplemental briefing, and the fact that Potomac is in bankruptcy, we find that equity demands that Leisher be held jointly and severally liable for the total amount of expenses imposed against Potomac and Leisher and modify the orders accordingly. (See *Sagadin v. Ripper* (1985) 175

Cal.App.3d 1141, 1170 ["Whenever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination."]; *Munoz v. City of Union City* (2007) 148 Cal.App.4th 173, 182-183 [modification made to reapportion liability between two defendants when a third defendant found not liable].)

IV. SANCTIONS

California Rules of Court, rule 3.650 requires a bankrupt party that has caused the appeal to be stayed to "immediately serve and file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed." Further, it is a violation of federal law to maintain this appeal in any manner that is considered a "continuation of an action against the debtor." (*Parker v. Bain, supra*, 68 F.3d at pp. 1135-1136; *Keitel v. Heubel, supra*, 103 Cal.App.4th pp. 332-333; 11 U.S.C. § 362(a)(1).)

Counsel for Potomac, the bankrupt party, does not dispute that this appeal is stayed in part, nor that he had full knowledge of the bankruptcy proceeding. His only excuse for not giving the court and respondent notice of the bankruptcy proceeding was that he was "under the impression" bankruptcy counsel had notified the court of the bankruptcy. However, he gives no support for this assertion, and the docket shows no notice of the bankruptcy was given to this court until Wilson did so, after the matter was briefed and set for oral argument. The only way attorney Blumberg could have been "under the impression" bankruptcy counsel had given notice was if he had been given a

notice of stay that had been filed with this court. Further, if he had been "under the impression" bankruptcy counsel had given notice of the stay, he would have noted the stay in his appellate briefs and would have argued the appeal only as to issues that were not stayed. Instead, without notifying this court and respondent Wilson of the stay, he argued only Potomac and not Leisher individually should be liable for the fees. This argument, made with knowledge of the bankruptcy, indicates an intention to abuse the appellate process by attempting to shift liability solely to a party who would likely not, because of the bankruptcy and stay, be held liable for the fees. It was also in direct violation of the automatic stay to attempt to increase Potomac's (and lessen Leisher's) liability for the receiver's expenses.

Further, there is no excuse for the failure to give notice of the bankruptcy, given counsel's involvement with the bankruptcy proceeding itself. Attorney Blumberg signed the involuntary petition as a petitioning creditor. Interestingly, he signed the involuntary petition as the "Managing Member" of an entity called Preferred Life Solutions. It has been alleged in the bankruptcy proceedings that Preferred Life Solutions is an alter ego of Leisher, that the chapter 11 petition is collusive and fraudulent, and that attorney Blumberg, Leisher and Potomac's counsel on this appeal, was involved in the collusion and fraud. These facts also support the conclusion attorney Blumberg's failure to give notice of the stay was not "an unintentional oversight" as he claims.

Based upon the failure to give notice of the stay, respondent Wilson has had to expend attorney fees to respond to arguments made by Leisher and Potomac that would have been unnecessary if notice of the stay had been given. This court has likewise had

to spend time and efforts on this case, acting under the assumption we could rule on issues that are stayed.

However, we conclude that Leisher and his counsel should not bear 100 percent of the \$28,000 in fees counsel for Wilson, the receiver, has allegedly incurred on appeal since the bankruptcy proceeding was filed. A large percentage would have been incurred regardless of the bankruptcy filing. Rather, we conclude \$1,800 is a reasonable amount to be awarded to respondent for his attorney fees. Accordingly, we order sanctions in the amount of \$900 as against Leisher and \$900 as against attorney Blumberg.

DISPOSITION

That portion of the appeal asserting only Potomac should bear the receiver's fees is stayed. We order \$900 in sanctions against Leisher and \$900 in sanctions against attorney Blumberg payable to Wilson. We modify the orders to make Leisher jointly and severally liable for the total amount of receivership expenses awarded as against Potomac and Leisher. In all other respects, the orders are affirmed. Wilson shall recover his costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.